JANET OOI HUI MING v. STC MANAGEMENT SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
AHMAD FAIRUZ ZAINOL ABIDIN J
[CIVIL SUIT NO: WA-22NCC-444-10-2018]
2 OCTOBER 2020

CONTRACT: *Agreement – Breach – Parties entered into agreement for establishment and management of school – Whether agreement was franchise agreement – Whether agreement void and unlawful – Whether franchise registered – Whether there was fraudulent misrepresentation – Whether there was breach of agreement – Franchise Act 1998, ss. 4 & 6(1) – Contracts Act 1950, ss. 2(g), 18 & 66*

CONTRACT: *Agreement – Breach – Parties entered into agreement for establishment and management of school – Allegations that agreement void and unlawful – Whether claimant entitled to restitution – Whether entitled to be restored to position claimant would have been had tort not been committed – Whether entitled to all payments made under agreement – Contracts Act 1950, s. 66*

The plaintiff entered into an agreement with the first and second defendants for the establishment and management of a school by the plaintiff ('agreement'). The second defendant was the sole owner, director, representative and agent of the first defendant. The school provided linguistic studies and training services under the unified image of the Shane English School/Language Centre syllabus or brand purportedly owned by the first defendant ('Shane brand'). The agreement set out, among others, the terms for the establishment and management of a school by the plaintiff which involved linguistic studies and training services under the unified image of the Shane brand ('plaintiff's Shane Centre'). Pursuant to the agreement, the plaintiff paid RM100,000 with RM6,000 in GST tax to the first defendant as 'initial fees'. The plaintiff also paid RM9,930.24 to purchase the Shane brand school books for the plaintiff's Shane Centre. The plaintiff then entered into a tenancy agreement to rent two shop units in Kuala Lumpur to operate the plaintiff's Shane Centre and renovations were carried out. The plaintiff's Shane Centre eventually opened and began operations in November 2017. Sometime in March 2018, the defendant established another Shane brand centre. By way of a letter, the plaintiff accepted the first defendant's repudiatory breach of the agreement. The agreement was terminated. The plaintiff contended that the agreement was void and unlawful as (i) it was for an unregistered franchise; (ii) the first defendant and/or the second defendant negligently, recklessly and/or fraudulently made misrepresentations to the

plaintiff in relation to the agreement; and/or (iii) in the alternative, the first defendant breached the terms of the agreement. Arising from the above, the plaintiff suffered loss and damages and hence, the plaintiff commenced this suit against the defendants. The defendant's case was that the agreement was not for a franchise but merely for the grant of a licence for the plaintiff to use the Shane brand. The defendants further denied any misrepresentation and breach.

Held (allowing claim):

(1) When read in light of the factual matrix, it was clear that the agreement was a franchise agreement. It was not a licence agreement as contended by the defendants. This finding was fortified after carrying an examination of the definition of a franchise as provided in s. 4 of the Franchise Act 1998 ('Act') and juxtaposing the said definition to the terms of the agreement. (paras 18 & 19)

(2) The net effect of the agreement satisfied the four limbs in s. 4 of the Act: (i) the first defendant granted to the plaintiff the right to operate the Shane Centre according to the Shane 'cooperation chain system' and Shane manuals as well as policies as determined by the first defendant during the term of the agreement. The s. 4(a) limb of the Act was satisfied; (ii) the first defendant granted to the plaintiff the right to use the Shane mark, syllabus, teaching materials and intellectual property owned by the first defendant or which the first defendant was licensed by another to use. The s. 4(b) limb of the Act was satisfied; (iii) the first defendant possessed the right to administer continuous control during the term of the agreement over the plaintiff's business operations in accordance with the Shane system. This included the requirement for the plaintiff to operate the plaintiff's Shane Centre in strict compliance with business policies established by the first defendant as outlined in the agreement and the associated operation manuals as provided by the first defendant. The first defendant retained a continuous control by retaining the right to decide the location of the centre, conducting inspections and monitoring exercises on the plaintiff's accounts and operations at any time and to ensure compliance, and retained very wide powers to sanction the plaintiff in the event of any breach. The s. 4(c) limb of the Act was satisfied; and (iv) in return, the plaintiff was to pay the first defendant the initial fees and the monthly fees. The s. 4(e) limb of the Act satisfied. (para 22)

(3) Section 6(1) of the Act provides that 'a franchisor shall register his franchise with the Registrar (of Franchise) before he can operate a franchise business or make an offer to sell the franchise to any person'. A failure to register a franchise attracts a penal sanction as provided under s. 6(2) of the Act. The second defendant in his evidence confirmed

that the Shane brand was not registered with the Malaysian Registrar of Franchise. Clearly, the first defendant was operating a franchise business without first registering it with the Registrar. The effect of non-registration of the Shane brand franchise rendered the agreement (as a franchisee agreement) being tainted with illegality, consequently rendering the agreement void. This was consonant with s. 2(g) of the Contracts Act 1950 ('Contracts Act') which reads 'an agreement not enforceable by law is said to be void'. The agreement was also unlawful given the failure to register the said franchise. Reference was made to s. 24 of the Contracts Act. (paras 3, 30, 31 & 33-35)

(4) The first defendant, *via* the second defendant, misrepresented to the plaintiff and that misrepresentation fell under s. 18 of the Contracts Act. By the act of executing the agreement, it must be inferred that the first defendant, *via* the second defendant, represented to the plaintiff that the first defendant had a valid and registrable Shane brand franchise in Malaysia. Similarly, it could be taken that the first defendant was representing itself as solvent, in good financial health and was in the position to honour and comply with all of its obligations for the duration of the agreement. The first and/or the second defendant were therefore guilty of negligent, reckless and/or fraudulent misrepresentation when they made the representations as: (i) they did so knowing them to be false and without any belief in its truth; and (ii) with an intention to induce the plaintiff to executing the agreement. In reliance of the above representations, the plaintiff entered into the agreement. This resulted in injury to the plaintiff when it transpired that the agreement was void as the Shane brand was not a valid franchise for not having been registered as a franchise in Malaysia and that the first defendant was insolvent and ceased being a going concern when it was wound up. (paras 40, 42, 45 & 46)

(5) There was no hesitation to hold that the threshold to pierce the corporate veil to attach personal liability on the part of the second defendant, given that liability was alleged and it was not disputed that the second defendant was the sole owner, director, representative and agent of the first defendant who dealt with the plaintiff. In short, he was the alter ego of the first defendant. The tort was commissioned by the second defendant himself who must therefore be made liable for the tort and the damage flowing from it. It is trite that a director of a company is personally liable for the torts of a company if he ordered, procured or directed the commission of the tort. From the facts, it could be summarised that the second defendant stood to gain personally from the venture. It was an irresistible conclusion that the second defendant had carried on the business of the first defendant with an intent to defraud and with fraudulent purposes. (paras 64-66)

(6) The plaintiff was entitled to restitution under s. 66 of the Contracts Act as the agreement was void for illegality. It followed that the plaintiff was entitled to be restored to the position she would have been had the tort not been committed. This essentially meant that the plaintiff was entitled to all payments made by her to the defendants under the agreement. Renovations did take place and the plaintiff incurred the expenses to equip the school which included materials such as books and photocopied documents. The expenses were not extravagant and were not indiscriminately incurred. Furthermore, it was incurred to meet the requirements of the purported franchise which the second defendant himself closely supervised. The plaintiff was therefore entitled to the following: (i) the sum of RM115,930.24 made up of the initial fees plus GST and the sums paid for the teaching materials; (ii) renovation of the premises amounting to RM28,922; (iii) the sum of RM379.20 being the purchase of story books for the purposes of the Shane Centre's operations; (iv) the sum of RM29,789.50 being salary payments of staff for the operations of the Shane Centre; and (v) various operational and capital expenses which amounted to the sum of RM36,399.83. (paras 68, 69, 75 & 76)

Case(s) referred to:

Abdul Razak Datuk Abu Samah v. Shah Alam Properties Sdn Bhd & Another Appeal [1999] 3 CLJ 231 CA ***(refd)***

Borneo Co (M) Sdn Bhd v. Penang Port Commission [1975] 1 LNS 5 FC ***(refd)***

Dr HK Fong Brainbuilder Pte Ltd v. SG-Maths Sdn Bhd & Ors [2018] 1 LNS 773 HC ***(refd)***

Keng Huat Film Co Sdn Bhd v. Makhanlall (Properties) Pte Ltd [1983] 2 CLJ 187; [1983] CLJ (Rep) 186 FC ***(refd)***

Kwan Chew Holdings Sdn Bhd v. Kwong Yik Bank Bhd [2007] 2 CLJ 127 CA ***(refd)***

Munafsya Sdn Bhd lwn. Proquaz Sdn Bhd [2013] 2 CLJ 189 HC ***(refd)***

Noraimi Alias v. Rangkaian Hotel Seri Malaysia [2009] 9 CLJ 815 HC ***(refd)***

Pardeep Kumar Om Parkash Sharma & Anor v. Abdullah Sani Hashim & Another Appeal [2008] 1 LNS 669 CA ***(refd)***

Solid Investments Ltd v. Alcatel-Lucent (Malaysia) Sdn Bhd [2014] 3 CLJ 73 FC ***(refd)***

SP Multitech Intelligent Homes Sdn Bhd v. 1 Home Sdn Bhd [2010] 1 LNS 1286 HC ***(refd)***

Tea Delights (M) Sdn Bhd & Anor v. Yeap Win Nee & Anor [2015] 1 LNS 936 HC ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 2(g), 18, 24, 66

Evidence Act 1950, s. 73A(2)

Franchise Act 1998, ss. 4(a), (b), (c), (e), 6(1), (2), 58

For the plaintiff - Tan Sheng Neng; M/s Marcus Tan & Co

For the defendants - Rajeswari Paramasevam; M/s Salvan Rajes & Assocs

Reported by Lina E

JUDGMENT

Ahmad Fairuz Zainol Abidin J:

Introduction

[1] The plaintiff entered into an agreement with the first and second defendants for the establishment and management of a school by the plaintiff ("the agreement"). The school provided linguistic studies and training services under the unified image of the Shane English School/Language Centre syllabus or brand purportedly owned by the first defendant ("Shane Brand").

[2] The plaintiff contends that the agreement was void and unlawful as it was for an unregistered franchise, that the first defendant and/or the second defendant negligently, recklessly and/or fraudulently made misrepresentations to the plaintiff in relation to the agreement and/or in the alternative the first defendant breached the terms of the agreement.

[3] Arising from the above, the plaintiff suffered loss and damages. On 4 October 2018, the plaintiff commenced this suit against the defendants.

[4] The defendants' case is that the agreement was not for a franchise but merely for the grant of a licence for the plaintiff to use the Shane Brand. The defendants further deny any misrepresentation and breach.

[5] The trial of this action was held for six days. During the course of the trial, the plaintiff called one witness and the defendants called two witnesses to give evidence on their behalf. The witnesses are:

(i) PW1 – Janet Ooi Hui Ming, the plaintiff;

(ii) DW1 – Ng Pei Pei, former staff of the first defendant; and

(iii) DW2 – Tan Choon Thong, the second defendant and former director of the first defendant.

[6] At the conclusion of the trial, this court allowed the claim by the plaintiff and awarded damages as prayed for in the statement of claim.

The Facts Presented During Trial

[7] It was established during trial that the second defendant was the sole owner, director, representative and agent of the first defendant. Sometime in July 2017, the plaintiff attended a franchise fair in Mid Valley Megamall where she met the second defendant. During the meeting, the second defendant informed the plaintiff that the first defendant had authority to operate and sell the Shane Brand in Malaysia, which it recently obtained from the owners in Taiwan ("Shane Taiwan").

[8] In the same month, the plaintiff met with the second defendant to discuss cooperation between the two in respect of the Shane Brand. At the conclusion of the meeting, the second defendant handed a draft of the agreement to the plaintiff for her consideration.

[9] On 24 July 2017, the plaintiff and the second defendant (on behalf of the first defendant) executed the agreement, which sets out the terms for the establishment and management of a school by the plaintiff which involves linguistic studies and training services under the unified image of the Shane Brand ("the plaintiff's Shane Centre").

[10] Pursuant to the agreement, the plaintiff was required to pay to the first defendant "initial fees" of RM100,000. It is not disputed that between 24 July 2017 and 1 August 2017, the full amount was paid by the plaintiff to the first defendant. The purported GST tax of RM6,000 was paid on 20 September 2017.

[11] It is also not disputed that pursuant to the agreement, the plaintiff paid the sum of RM9,930.24 to purchase the Shane Brand school books for the plaintiff's Shane Centre.

[12] Sometime around September 2017, the plaintiff entered into a tenancy agreement to rent two shop units at 16-1 and 16-2, Jalan Rimbunan Raya, Laman Rimbunan Kepong, 52100 Kuala Lumpur ("premises") to operate the plaintiff's Shane Centre. Renovations were undertaken, and the said centre eventually opened and began operations on 11 November 2017.

[13] Sometime in March 2018, the second defendant established another Shane Brand centre somewhere in Jalan Ipoh, Kuala Lumpur.

[14] Under the agreement, the Shane Brand syllabus can only be taught by a Shane approved teacher. For this, one Mr Peter Kassouf ("Mr Kassouf") was appointed to teach at the plaintiff's Shane Centre. However, on 1 April 2018, Mr Kassouf ceased teaching at the said centre.

[15] By way of her solicitors' letter dated 11 April 2018, the plaintiff accepted the first defendant's repudiatory breach of the agreement. The agreement was then terminated.

Findings And Analysis Of This Court

Whether Agreement Was A Franchise Agreement

[16] It is a settled law that when determining the true nature of an agreement, a court is required to take an objective approach. The factual matrix forming the background of the contract must be considered to determine the objective and aim or purpose of the transaction. In the Court of Appeal case of *Kwan Chew Holdings Sdn Bhd v. Kwong Yik Bank Bhd* [2007] 2 CLJ 127, Gopal Sri Ram JCA (as he was then) held:

When a court is asked to determine a true nature of a bargain between contracting parties it is required to take an objective approach. It must have regard to the factual matrix forming the background to the Contract to determine the objective aim or purpose of the transaction. It is the objective view based on the test of the reasonable man that is the determining factor and not the subjective view of a party to the Contract. The authorities on this point are legion ...

Gopal Sri Ram JCA made reference to the case of *Prenn v. Simmonds* [1971] 3 All ER 237 where Lord Wilberforce said:

> The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistics considerations. There is no need to appeal here to any modern, anti-literal, tendencies, for Lord Blackburn's well-known judgment in *River Water Commissioners v. Adamson* [1977] 2 App Cas 743 at p. 763 provides ample warrant for a liberal approach. We must, as he said, enquire beyond the language and see what the circumstances were with reference to which the words were used, and the object, appearing from those circumstances, which the person using them had in view ...

[17] It is also the position of law that evidence of negotiations leading up to the contract is to be excluded. Similarly excluded are the parties' subjective intentions of what each parties hope to achieve. In *Keng Huat Film Co Sdn Bhd v. Makhanlall (Properties) Pte Ltd* [1983] 2 CLJ 187; [1983] CLJ (Rep) 186 the following was held:

> For the construction of a written Agreement the established doctrine is *firstly to exclude evidence of negotiations leading up to the Contract on the ground that it is only the final Agreement which records a consensus and as such evidence of negotiations is unhelpful; and secondly to exclude evidence of the parties' subjective intentions so that any individual purpose which either of them hope to achieve by the Agreement and their own interpretation and understanding of the Agreement is not admissible.* As against this, evidence of surrounding circumstances and factual background have always been admissible. (emphasis added)

[18] Upon scrutinising the construction of the agreement, when read in light of the factual matrix, it is clear to this court that the agreement was a franchise agreement. It is not a licence agreement as contended by the defendants.

[19] This court is fortified in its finding after carrying an examination of the definition of a franchise as provided in s. 4 of the Franchise Act 1998 ("the Act") and juxtaposing the said definition to the terms of the agreement.

[20] Section 4 of the Act defines franchise as follows:

A "franchise" means a contract or an agreement, either expressed or implied, whether oral or written, between two or more persons by which:

(a) the franchisor grants to the franchisee the right to operate a business according to the franchise system as determined by the franchisor during a term to be determined by the franchisor;

B (b) the franchisor grants to the franchisee the right to use a mark, or a trade secret, or any confidential information or intellectual property, owned by the franchisor or relating to the franchisor, and includes a situation where the franchisor, who is the registered user of, or is licensed by another person to use, any intellectual property, grants such right that he possesses to permit the franchisee to use the intellectual property;

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(c) the franchisor possesses the right to administer continuous control during the franchise term over the franchisee's business operations in accordance with the franchise system; and

D (d) (Deleted by Act A1442; s. 3(a)(ii))

(e) in return for the grant of rights, the franchisee may be required to pay a fee or other form of considerations

(f) (Deleted by Act A1442; s. 3(a)(ii))

E **[21]** The salient terms of the agreement are as follows:

(i) the first defendant vests the plaintiff with the right to establish and run one Shane Centre during the period of the agreement by utilising the know-how of the school management under the "cooperation chain system" as well as the Shane Brand trade names, trademarks and other symbols which are controlled by the first defendant.

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(ii) in return, the plaintiff is to pay to the first defendant:

(a) RM100,000 in initial Fees; and

(b) monthly fees of RM1,000 or 10% of gross tuition revenue whichever is the higher, on a quarterly basis.

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(iii) The plaintiff must run the Shane Centre strictly in accordance with the business policies established by the first defendant as outlined in the agreement and the associated operation manuals as provided by the first defendant.

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(iv) In order to maintain the uniform image of the Shane Brand, the first defendant shall, among other things:

(a) provide various manuals and handbooks during the period of the agreement, including in respect of operations of the Shane School; and

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(b) the plaintiff may promote the Shane Brand subject to prior approval of the first defendant and in accordance with policies defined by the first defendant. In this, the first defendant reserves the right to change or modify the content of such promotional materials. The plaintiff shall comply with the detailed instructions regarding regular advertising, publicising and marketing activities which will be provided by the first defendant.

(v) The plaintiff cannot open or operate a Shane Centre (a) without prior approval from the first defendant confirming the location of the centre; and (b) before the plaintiff's staff has completed training.

(vi) The plaintiff shall only use the Shane Brand's trademarks and other such associated marks in accordance with the description of manuals or documents specified by the first defendant and the plaintiff must follow the first defendant's instructions in respect of such use.

(vii) All teaching materials used by the plaintiff must come from, or be approved by, the first defendant.

(viii) the plaintiff was to provide monthly reports to the first defendant on the operations of the plaintiff's Shane Centre as well as account books. The first defendant is further entitled to conduct on-the-spot inspections and monitor the centre to ensure compliance with the terms of the agreement, teaching system, financial performance and all other items related to the Shane business. Should the plaintiff be found to have breached the agreement or failed to obey any improvement order given by the first defendant, the first defendant is entitled to cease dispatching teachers to the plaintiff, suspend the operations of the centre or refuse to renew the agreement.

[22] The net effect of the agreement satisfies the four limbs in s. 4 of the Act:

(i) the first defendant grants to the plaintiff the right to operate the Shane Centre according to the Shane "cooperation chain system" and Shane manuals as well as policies as determined by the first defendant during the term of the agreement. The s. 4(a) limb of the Act is satisfied;

(ii) the first defendant grants to the plaintiff the right to use the Shane mark, syllabus, teaching materials and intellectual property owned by the first defendant or which the first defendant is licensed by another to use. The s. 4(b) limb of the Act is satisfied;

(iii) the first defendant possesses the right to administer continuous control during the term of the agreement over the plaintiff's business operations in accordance with the Shane system. This includes the requirement for

A the plaintiff to operate the Shane Centre in strict compliance with business policies established by the first defendant as outlined in the agreement and the associated operation manuals as provided by the first defendant. The first defendant retains a continuous control by retaining the right to decide the location of the centre, conduct inspections and
B monitoring exercises on the plaintiff's accounts and operations at any time, and to ensure compliance, retains very wide powers to sanction the plaintiff in the event of any breach. The s. 4(c) limb of the Act is satisfied; and

(iv) In return, the plaintiff is to pay the first defendant the initial fees and
C the monthly fees. The s. 4(e) limb of the Act is satisfied.

[23] It is also a finding of this court that the first and the second defendants retained very significant control over the manner in which the plaintiff's Shane Centre is operated. This included controlling the designs and specifications required under the Shane Brand. In this, it is not disputed that
D the plaintiff was sent by the first and the second defendants to Shane's headquarters in Taiwan, where she was given design specifications to comply in the renovations of the premises.

[24] The first and second defendants also had control over who the plaintiff
E hires or how the plaintiff's Shane Centre was staffed. This can be seen when:

(i) the first defendant/the second defendant demanded that the plaintiff dismiss one Ms Joey from the plaintiff's Shane Centre, despite the accepted fact that Ms Joey was in the plaintiffs employ and despite the plaintiff's wish to retain Ms Joey. The plaintiff had no choice but to
F comply with the first defendant/the second defendant's directions; and

(ii) the first defendant/the second defendant on 5 April 2018 unilaterally and without reasonable basis withdrew Mr Kassouf's services from the plaintiff and the plaintiff's Shane Centre.

G **[25]** Furthermore, the first and the second defendants retained a right to dictate how the operations of the Shane Centre was to be carried out, including dictating to the plaintiff on payment arrangements with students.

[26] The contemporaneous documents of the first and the second defendants, namely their payment receipts and their letters issued to the
H plaintiff, make clear that the defendants had at all material times considered themselves as a franchisor, the plaintiff as a franchisee and the business relationship being the grant of a franchise. An example of the existence of such an arrangement can be seen when the first defendant issued receipts through its staff by describing the purpose of payment as "franchise fees".

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[27] The conduct of the first defendant made the plaintiff belief that it was a franchise arrangement. It follows that as far as the plaintiff was concerned, she was running a franchise based on the agreement entered.

[28] For the reasons mentioned above, without hesitation, this court finds that the arrangement between the plaintiff and the defendants was for the operation of a franchise of the Shane Brand linguistic school.

Whether The Agreement Was Void And Unlawful

[29] A crucial element to all the operationalisation of a franchise is the registration of the franchise itself.

[30] Section 6(1) of the Act provides that "a franchisor shall register his franchise with the Registrar (of franchise) before he can operate a franchise business or make an offer to sell the franchise to any person".

[31] It is worth to note that a failure to register a franchise attracts a penal sanction as provided under s. 6(2) of the Act which states "A person who fails to comply with this section commits an offence unless he has been exempted by the Minister under s. 58 from the requirement to register under this section".

[32] In *Noraimi Alias v. Rangkaian Hotel Seri Malaysia* [2009] 9 CLJ 815, Mary Lim J (as she then was) emphasised the importance of registering a franchise and highlighted the consequences of failing to do so:

> A quick perusal of the Act shows the regulation of franchise is through a system of registration of franchises. *The importance of registration is reflected in the imposition of penalties. Unless the person, class of persons, business or industry is exempted from all or any of the provisions of the Act, including the requirement of registration, the failure to register before offering the franchise for sale is an offence.*
>
> (emphasis added)

(See also *Tea Delights (M) Sdn Bhd & Anor v. Yeap Win Nee & Anor* [2015] 1 LNS 936; [2016] 7 MLJ 92 and *Dr HK Fong Brainbuilder Pte Ltd v. SG-Maths Sdn Bhd & Ors* [2018] 1 LNS 773; [2018] 11 MLJ 701 where the courts emphasised the need for registration of the franchise).

[33] The second defendant in his evidence confirmed that the Shane Brand was not registered with the Malaysian Registrar of Franchise.

> TSN: And so, basically, effectively, from what you are saying now, in Malaysia, you do not have, **you did not register any franchise for the Shane brand in Malaysia.**
>
> TAN: **Yes.**
>
> TSN: So, effectively you do not, you are not authorised to run or operator give out a Shane franchise in Malaysia.
>
> TAN: **If franchise, don't have but licensing yes.**
>
> (emphasis added)

[34] Clearly, the first defendant was operating a franchise business without first registering it with the Registrar.

[35] The effect of non-registration of the Shane Brand franchise renders the agreement (as a franchise agreement) being tainted with illegality, consequently rendering the agreement void. This is consonant with s. 2(g) of the Contracts Act 1950 which reads "an agreement not enforceable by law is said to be void". The agreement is also unlawful given the failure to register the said franchise. Reference is made to s. 24 of the Contracts Act 1950 which provides:

> The consideration or object of an agreement is lawful, unless:
>
> (a) it is forbidden by a law;
>
> (b) it is of a nature that, if permitted, it would defeat any law.

(See also *SP Multitech Intelligent Homes Sdn Bhd v. 1 Home Sdn Bhd* [2010] 1 LNS 1286; [2010] MLJU 1845).

[36] Counsel for the defendants argued that the duty to register the franchise was on the plaintiff. With respect, this argument does not hold water. It is the position under the Act that a franchise has to be registered with the Registrar. In the case of *Munafsya Sdn Bhd lwn. Proquaz Sdn Bhd* [2013] 2 CLJ 189, a similar scenario arose. In the said case, the parties who took up the franchise attempted to register with the Education Department their "taska francais" only to be declined by the said department as the franchise was never registered in the first place. The same argument applies in the current case before this court.

[37] It is also observed that non-registration was never the pleaded case of the defendants. As such, it merits no consideration as a party is bound by its own pleadings (see *Pardeep Kumar Om Parkash Sharma & Anor v. Abdullah Sani Hashim & Another Appeal* [2008] 1 LNS 669; [2009] 2 MLJ 685).

[38] The defendants in their bid to argue that the agreement was not a franchise agreement also contended that there was no "know-how or skills in the operations of the language centre" in the agreement which is the primary trait of a franchise. It is the view of this court that this is not a prerequisite to determine whether an agreement involves a franchise or otherwise. What is crucial is the fact that the obligations in the agreement falls under the definition of a franchise in s. 4 of the Act.

[39] In *Munafsya Sdn Bhd lwn. Proquaz Sdn Bhd* [2013] 2 CLJ 189, Tengku Maimun Tuan Mat J (now CJ) held that a court is not bound by the label or description of the agreement in question. Even if the agreement is not entitled "franchise" contract or the word "franchise" does not feature at all in the document, it can still amount to a franchise if the terms fulfil the s. 4 elements. As such, what is crucial to be determined is whether the

agreement contains terms that fall within the definition of a franchise under the Act (see also *Dr HK Fong Brainbuilder Pte Ltd v. SG-Maths Sdn Bhd & Ors* [2018] 1 LNS 773; [2018] 11 MLJ 701).

Misrepresentations

[40] It is the view of this court that the first defendant *via* the second defendant misrepresented to the plaintiff and that the misrepresentation falls under s. 18 of the Contracts Act 1950. The provision reads as follows:

> "Misrepresentation" includes:
>
> (a) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
>
> (b) any breach of duty which, without an intent to deceive, gives an advantage to the person committing it, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; and
>
> (c) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

[41] Clearly, there was positive assertion made with regards to the ability of the first defendant being able to grant the franchise to the plaintiff which led the plaintiff to rely on the said representation.

[42] By the act of executing the agreement, it must be inferred that the first defendant *via* the second defendant represented to the plaintiff that the first defendant had a valid and registrable Shane Brand franchise in Malaysia. Similarly, it can be taken that the first defendant was representing itself as solvent, in good financial health and was in a position to honour and comply with all of its obligations for the duration of the agreement.

[43] The defendants argued that there was no misrepresentation by the second defendant. Instead, it was a misunderstanding on the part of the plaintiff herself of the terms of the agreement. This court rejects the argument primarily because there was ample evidence to show the falsity of the representation made by the second defendant. This included:

(i) Shane Brand has not been registered as a franchise in Malaysia.

(ii) As at the date the agreement was executed by parties, the first defendant was insolvent and/or was not in a position to honour the terms of the agreement at all material time. The following contemporaneous documents, which parties admitted to as agreed document show that:

   (a) On 5 July 2017, OCBC Al-Amin Bank Bhd ("OCBC") issued a demand to the first defendant for the sum of RM171,172.42 in respect of the first defendant's default in loan repayments of RM4,500 a month.

A (b) On 25 July 2017, OCBC commenced a suit against the first and the second defendants for, amongst others, the sum of RM193,918.66.

(c) On 23 August 2017, judgment was entered against the first defendant on the said sum of RM193,918.66.

B (d) On 4 December 2017, OCBC presented a winding-up petition against the first defendant. The first defendant was wound up on 8 February 2018.

[44] The first defendant was for all intents and purposes commercially insolvent as at 5 July 2017 as the first defendant was no longer able to meet C current demands made by OCBC even to finance its loan repayment of RM4,500 a month. As at 5 July 2017, it would not have been in any position to honour any of its obligations under the agreement, the first defendant was eventually wound up on 8 February 2018, leaving the agreement in a state of uncertainty.

D **[45]** The first defendant and/or the second defendant are therefore guilty of negligent, reckless and/or fraudulent misrepresentation when they made the representations as:

(i) they did so knowing them to be false and without any belief in its truth;

E (ii) with an intention to induce the plaintiff to execute the agreement.

[46] In reliance upon the above representations, the plaintiff entered into the agreement. This resulted in injury to the plaintiff when it transpired that the agreement was void as the Shane Brand was not a valid franchise for not having been registered as a franchise in Malaysia and that the first defendant F was insolvent and ceased being a going concern when it was wound up on 8 February 2018.

[47] It cannot also be argued that the defendants did not have the intention to mislead the plaintiff. During the course of the trial, the second defendant was able to explain the concept of a franchise compared to a licence. That G was how he advanced his case. It is the finding of this court that despite knowing that the franchise was not registered, the second defendant continued to represent that a franchise of the language school was available to be taken up by the plaintiff.

H **[48]** It is clear that the second defendant had knowingly misrepresented the plaintiff. There was deceit practiced by the second defendant when he concealed the two material facts namely the non-registration of the franchise and the solvency of the first defendant. This induced the plaintiff to enter into the agreement. Therefore, there was intent on the part of the second defendant.

I

[49] This court finds the argument that the plaintiff was misled by her own doing and that the second defendant had no intention to misrepresent is overly simplistic and merits no consideration.

[50] This court accepts the contention of the plaintiff that the first defendant through the second defendant made the above representations to her in the course of negotiations, including at the meeting in July 2017, prior to the execution of the agreement. The plaintiff's evidence in this regard was not challenged by the defendants.

[51] The fact that the above terms ought to be accepted as inferred is also supported by the second defendant's admission in court. During cross-examination, the second defendant nonchalantly admitted as follows:

TSN: And obviously, Ms Ooi was entitled to rely on the fact that STC had the necessary right to give her such an authority to use the brand.

TAN: Yes.

TSN: And it was also correct for her to expect that STC was able to comply with its obligations under this agreement

TAN: Yes.

[52] As such, it is the finding of this court that there was misrepresentation by the first and the second defendants.

Assessment Of Credibility

[53] It is crucial that this court makes mention of the assessment of credibility of the main witnesses that appeared before this court.

[54] The plaintiff was the sole witness in her case. She appeared calm throughout the trial but for some display of emotion when she recounted how she had loss her investment. Be that as it may, what is important to this court is the fact that the plaintiff was able to articulate without hesitation what she went through from the time she went to the franchise exhibition at the PWTC in Kuala Lumpur right up to the breakdown of the business venture. She did not waver during the course of cross-examination. There is no reason for this court to doubt her testimony.

[55] In contrast, the second defendant who was the main witness of the defence, had a casual and unreserved demeanour. Throughout his testimony, he was smiling and at times sniggering to show incredulity on his part to certain questions. He was eager to volunteer answers even when the responses were not required. This resulted in some very damaging admission made when answering questions posed by the plaintiff's counsel, some of which had been quoted by this court in the body of this judgment.

[56] He portrayed himself as a person who has been long in the education field. This was backed by his explanation that he once owned about 17 tuition centres. It was not surprising that the plaintiff was taken in with his explanation on the potential of the language school business.

[57] Although the second defendant was casual in his ways, he was however conscious of the claim against him. He was adamant that the agreement was licence agreement rather than a franchise agreement. While there was no basis to outrightly reject the second defendant's testimony, however, this court was slow to fully accept his version of events when compared to the terms of the agreement and also the contemporaneous documentation produced in court.

[58] It is this court's finding that based on the facts presented, the second defendant was directing how the business was to be run. His overbearing character dominated the business relationship.

[59] It is the finding of this court that the second defendant was a self-serving witness who earnestly tried to explain his way out of the arrangement despite the terms in the agreement.

D2 Liable Personally

[60] It was argued that the second defendant should not be liable as he was not a party to the agreement. This court is of the view that this argument is flawed. It is the view of this court that the second defendant is personally liable for damages for the reasons which will be discussed below.

[61] First, the piercing of the corporate veil to impose personal liability against the second defendant is justified given the facts of this case. There exists special circumstances to pierce or lift the corporate veil namely the existence of an illegal contract and it is in the interest of justice to pierce the said veil. The Federal Court in *Solid Investments Ltd v. Alcatel-Lucent (Malaysia) Sdn Bhd* [2014] 3 CLJ 73; [2014] 3 MLJ 785 held as follows:

> *We also agree with the Court of Appeal that there must be evidence either of actual fraud or some conduct amounting to fraud in equity to justify the lifting of corporate veil.* The position of the law on this subject had been clearly stated by Gopal Sri Ram JCA (as he then was) in *Law Kam Loy v. Boltex Sdn Bhd* [2005] 3 CLJ 355 at p 362 as follows:
>
> > In my judgment, in the light of the more recent authorities such as *Adams v. Cape Industries Plc*, it is not open to the courts to disregard the corporate veil purely on the ground that it is in the interests of justice to do so. *It is also my respectful view that the special circumstances to which Lord Keith referred include cases where there is either actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity ...* (emphasis added)

[62] Clearly, there has been conduct amounting to fraud perpetrated by the defendants. A

[63] This court is also guided by the analysis of Wong Kian Kheong J in the case of *Dr HK Fong Brainbuilder Pte Ltd v. SG-Maths Sdn Bhd & Ors* (*supra*) where His Lordship held: B

> [25] The Federal Court cases of ... have laid down the following *two conditions to be fulfilled ('two conditions') for the court to pierce or lift a corporate veil to reveal an individual as the company's alter ego, controller or directing mind and will:*
>
> (a) there exists special circumstances to pierce or lift the corporate veil ('first condition'), such as the existence of an illegal contract; and C
>
> (b) the piercing or lifting of a corporate veil is in the interest of justice ('second condition').
>
> [26] There is a difference between the piercing of a corporate veil and its lifting. A company's corporate veil is pierced by a party when the party seeks to impose personal liability on an individual. The court lifts (not pierces) the corporate veil of a company to ascertain the true factual position without imposing any personal liability on a particular individual – please see Staughton LJ's judgment in the English Court of Appeal case of *Atlas Maritime Co SA v. Avalon Maritime Ltd; The Coral Rose (No 1)* [1991] 4 All ER 769 at p 779. D E
>
> [28] This court pierces the first defendant's corporate veil to show that the second and third defendants are its alter ego because:
>
> (a) the second and third defendants have alleged illegality in this case. Hence, the fulfilment of the first condition in this case; and
>
> (b) the second condition is satisfied because the following evidence and reasons show that it is in the interest of justice to pierce the first defendant's corporate veil: F
>
> (i) if the second and third defendants are not the first defendant's alter ego, they would not have executed the guarantee to indemnify the plaintiff and its 'officers, directors, shareholders and employees against any and all losses, damages, liabilities, costs and expenses ... resulting from ... any failure' by the first defendant to perform the MLA (2013) – please see cl. 2 of the guarantee; G
>
> (ii) the second and third defendants own 85% of the total shares in the first defendant; H
>
> (iii) the second and third defendants are the only directors of the first defendant:
>
> (iv) emails, letters and minutes of meetings have been sent by Dr Fong, SP1, SP2 and the plaintiff to the second and third defendants (not to the first defendant) regarding the first defendant's BB Centres; and I

A (v) despite the fact that the termination notice was sent to the second and third defendants (not to the first defendant), the second and third defendants did not insist for the plaintiff to send the termination notice to the first defendant.

(emphasis added)

B **[64]** There is no hesitation on the part of this court to hold that the threshold to pierce the corporate veil to attach personal liability on the part of the second defendant, given that illegality is alleged and it is not disputed that the second defendant was the sole owner, director, representative and agent of the first defendant who dealt with the plaintiff. In short, he was the alter ego of the first defendant.

C

[65] The tort was commissioned by the second defendant himself, who must therefore be made liable for the tort and the damage flowing from it. It is trite that a director of a company is personally liable for the torts of a company if he ordered, procured or directs the commission of the tort.

D **[66]** From the facts, it can be summarised that the second defendant stood to gain personally from the venture. It is an irresistible conclusion that the second defendant had carried on the business of the first defendant with an intent to defraud and with fraudulent purposes. This is premised on the following reasons:

E (i) despite being aware that the first defendant was insolvent as at 5 July 2017, the second defendant led the plaintiff to believe that the first defendant was financially healthy and was able to honour its obligations under the agreement. The second defendant caused the plaintiff to pay the RM100,000 in fees by 1 August 2018;

F (ii) despite judgment having been entered against the first defendant on 23 August 2017 for the sum of RM193,918.66, the second defendant caused the plaintiff to further pay to the first defendant on 20 September 2017 the sum of RM6,000 as alleged GST;

G (iii) despite the first defendant having been wound up as at 8 February 2018, on or around March 2018, the second defendant demanded that the plaintiff make alleged payments of up to RM24,500, purportedly for teacher referral fees and intended visa and permit applications payable under the agreement; and

H (iv) the second defendant led the plaintiff to believe that the first defendant was a going concern, and made demands for payment from the plaintiff in order to procure further monies for his own benefit in spite of the second defendant's admission that he knew full well that he no longer had control over the first defendant when it was wound up on

I 8 February 2018. In evidence it can be seen as follows:

TSN: So, Mr Tan, listen to me carefully, now, I am not referring to documents. As at the date of 08.02.2018 when we have agreed STC was wound up, at that date itself on 08.02.2018, you effectively no longer have control over STC Management Sdn Bhd.

TAN: Agree.

TSN: STC was then under the control of a liquidator.

TAN: Yes.

TSN: Where the assets of STC would have been liquidated to pay its creditors.

TAN: Yes.

TSN: STC as a company; would therefore likely have ceased or would cease to be a going concern.

TAN: Yes.

TSN: Because it doesn't have money to continue the business.

TAN: Correct.

TSN: It can therefore also no longer comply with its obligations under the Shane agreement with Ms Ooi.

TAN: Agree.

TSN: In fact, STC cannot even continue or honour the terms of the employment contract with Peter.

TAN: Yes.

TSN: Or in fact, any of its contractual terms or relationship it may have with Shane Taiwan.

TAN: Correct.

TSN: Therefore, STC's authority or permission to use the Shane brand here in Malaysia would also have come to an end.

TAN: Agree.

TSN: You have never disclosed any of this to Ms Ooi.

TAN: Yes.

TSN: Agree?

TAN: Yes, agree.

TSN: She had to only, she was, if at all, she only found out all of this through her own efforts.

TAN: Agree.

TSN: Not from you, in fact.

TAN: Agree.

[67] Therefore, the second defendant was personally liable for damages in these proceedings.

Damages

[68] Given that this court finds that there was fraudulent misrepresentation perpetrated by the defendants, the plaintiff is entitled to restitution under s. 66 of the Contracts Act 1950 as the agreement was void for illegality. This essentially means that the plaintiff is entitled to all payments made by her to the defendants under the agreement. This includes the payment of RM115,930.24 being the initial fees paid, the teaching materials and the applicable GST charges.

[69] It follows that the plaintiff is entitled to be restored to a position she would have been had the tort not been committed.

[70] In *Abdul Razak Datuk Abu Samah v. Shah Alam Properties Sdn Bhd & Another Appeal* [1999] 3 CLJ 231; [1999] 2 MLJ 500, Gopal Sri Ram JCA held as follows:

> 14. Where damages are awarded for fraudulent misrepresentation – and we consider the principle to be the same to a case of negligent misrepresentation – the assessment of damages must take into account any sum recovered as restitution under the claim for rescission so as to prevent double recovery. *Damages for fraud are awarded on the basis that the innocent representee is put, so far as money can do so, in the position which he would have occupied had there been no reliance on the fraudulent inducement.* See, *Holmes v. Jones* [1907] 4 CLR 1692, at p. 1709; *Demetrios v. Gikas Dry Cleaning Industries Pty. Ltd.* [1991] 22 NSWLR 561, at p. 575; *Sellars v. Adelaide Petroleum NL* [1994] 179 CLR 332. The assessment of damages would therefore include all expenditure incurred reasonably and properly in consequence of and flowing directly from the deceit, whether before or after the date of the rescission, it may, where appropriate, include exemplary and aggravated damages. See *Archer v. Brown* (*ibid*).
>
> 15. ... The object of damages for breach of contract is to place the innocent party in the same position as though the contract had been performed. *But, in an action for fraudulent misrepresentation, the object of the law is to place the representee in the position he would have been had he not been induced. Hence, the rule as to remoteness of damage contained in s. 74 of the Contracts Act 1950* has no application whatsoever to an action for damages in the tort of deceit. (emphasis added)

[71] The defendants argued there was failure to call the relevant witnesses to prove the receipts that were tendered. This court, relying on *Borneo Co (M) Sdn Bhd v. Penang Port Commission* [1975] 1 LNS 5; [1975] 2 MLJ 204, would allow the claim despite the non-calling of the makers of the receipts. The Federal Court in explaining that the makers of documents can be dispensed with if it leads the incurring of unreasonable expenses, costs and delay held as follows:

> It would seem that when the contents of the customs declarations, invoices, tally sheets were recorded as not admitted the learned judge considered that the appellants were required to prove their contents. In other words, those documents were regarded as disputed documents. For convenience, those documents were allowed to be included in the Agreed Bundles when, strictly speaking, they should not. There is a distinction between evidentiary admissions and admissions by pleadings. The appellants should have called the maker or makers of the customs declarations to give evidence. As regards the invoices the provision of section 32(b) of the Evidence Act, 1950 was brought to the attention of the learned judge. *Considering the small amount of claim it would seem unreasonable to incur expenses very much over the amount of claim by calling the person or persons from England just to give formal evidence relating to the preparation of the documents. This would increase the cost of the proceedings and result in inconvenience and perhaps, delay.* (emphasis added)

[72] As such this court is of the view that the court is entitled to admit the said documents. There was also an explanation by the plaintiff that she was not able to procure the attendance of the makers of the documents which included lorry drivers, contractors, air condition installers and cashiers from bookshops. It was estimated that a further 15 witnesses were required to admit the various receipts.

[73] This court finds that requiring the maker of the documents to attend court would entail undue delay to the trial and incur unreasonable expenses. Section 73A(2) of the Evidence Act 1950 provides:

> 73A. Admissibility of documentary evidence in civil cases, etc
>
> ...
>
> (2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence:
>
> (a) notwithstanding that the maker of the statement is available but is not called as a witness; and
>
> (b) notwithstanding that the original document is not produced, if, *in lieu* thereof, there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or as the court may approve, as the case may be.

[74] As such, s. 73A was enacted to cater for situations which this court currently faces. It must however be applied after the court is satisfied of how the documents came into existence and the reasons for failing to call the maker.

[75] In the current case, it was never challenged that renovations took place. It is also not challenged that the plaintiff incurred the expenses to equip the school which included materials such as books and photocopied documents. The fact remains that the plaintiff, given the illegality of the contract and the injury she suffered as a result of the misrepresentation is entitled to be compensated. To deny her of the reasonably incurred expenses would be unfair. The expenses were not extravagant and was not indiscriminately incurred. Furthermore, it was incurred to meet the requirements of the purported franchise which the second defendant himself closely supervised.

[76] The plaintiff is therefore entitled to the following:

(i) the sum of RM115,930.24 made up of the initial fees plus GST and the sums paid for the teaching materials;

(ii) renovation of the premises amounting to RM28,922, which sums are made up as follows:

Renovation of the Premises			
Description	**Date**	**Amount (RM)**	**Reference**
Cabinets	5.10.2017	7,952	D/99
Air Conditioner & Services	28.10.2017	20,620	D/100
Lorry Service	3.11.2017	350	D/101

(iii) the sum of RM379.20 being the purchase of story books for the purposes of the Shane Centre's operations;

(iv) the sum of RM29,789.50 being salary payments of staff for the operations of the Shane Centre; and

(v) various operational and capital expenses including tenancy deposit, rental, utility bills, cleaning services, copier chargers, marketing advertisements and some operation expenses which amount to the sum of RM36,399.83, particulars of which are set out in detail in the witness statement of P marked as WS-SP1. Insofar as the tenancy deposit of RM12,000 is concerned, P was constrained to prematurely end the tenancy for the premises, which resulted in the security deposit of RM12,000 being forfeited.

Conclusion

[77] Based on the foregoing, the plaintiff's claim was allowed with costs.